Supreme Court, U. S.
FILED
DEC 22 1975
MICHAEL RODAK, JR., CLERK

No. 73-1596

In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 73-1596

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

v.

MOW SUN WONG, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE PETITIONERS

We file this supplemental brief to discuss the import of a decision of this Court subsequent to the original argument in this case, to address a question raised for the first time during that argument, and to bring to the Court's attention newly-enacted legislation.

1. The Civil Service regulation in issue generally limits, but does not totally prohibit, the employment of non-citizens in the competitive federal civil service. The only general exception is for non-citizen nationals

399-364—75——1

who owe permanent allegiance to the United States (Pet. Br. 4).

In claiming that the regulation is unconstitutional, respondents do not contend that alienage is always an impermissible criterion for federal policy or federal employment. Rather, they contend that the challenged regulation sweeps unecessarily broadly by excluding most aliens from federal employment (Resp. Br. 20–31). In essence they argue that citizenship may be used as a criterion for federal employment only on a case-by-case basis in response to a particularized need for use of that criterion (Resp. Br. 28–29). In urging that the regulation lacks a rational basis, respondents rely on cases such as *Vlandis* v. *Kline,* 412 U.S. 441, and *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (see Resp. Br. 30, n. 35).

It is our position (Pet. Br. 66–71) that such challenges to the balance struck concerning the employability of aliens should be directed to Congress or the Executive and are not an appropriate subject for judicial re-evaluation. Congress has authorized the President to adopt regulations that will best promote the "efficiency" of the civil service. 5 U.S.C. 3301(1). Exercising that authority, the Civil Service Commission has determined—properly, we submit—that a general limitation on the eligibility of aliens is more efficient than would be individualized determinations as to whether alienage should render a particular person ineligible for a specific position (see Pet. Br. 67–69). We believe that the constitutionality

of that approach has been confirmed by the Court's recent decision in *Weinberger* v. *Salfi,* No. 74-214, decided June 26, 1975.

In *Salfi* the Court held that in cases involving social welfare legislation or noncontractual claims to receive funds from the public treasury Congress is entitled to use broad classifications, so long as those classifications do not burden fundamental personal rights. Slip op. at 16–20, 25, 33. In rejecting a contention that eligibility must be ascertained case-by-case, the Court observed in *Salfi* that "[t]he administrative difficulties of individual eligibility determinations" may properly be considered to justify "rules which sweep more broadly than the evils with which they seek to deal." *Id.* at 32. As the Court stated, the Constitution does not preclude "a substantive policy determination that limited resources would not be well spent in making individual determinations" (*ibid.*) and that a particular program may be best served by a rule that is "objective and easily administered" (*id.* at 33). Where, as here, individualized determinations of whether a particular alien might be a security risk, has divided national loyalties, ought not to be given policy-making power, and so on, would be exhausting and inexact, and where, as here the program in issue "do[es] not involve affirmative government action which seriously curtails important liberties cognizable under the Constitution," the Court should follow *Salfi's* holding that (*ibid.*):

> There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized

rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.[1]

2. We have argued that the challenged regulation, which prevents the federal government from hiring aliens in certain circumstances, should be viewed as a limited exercise of the substantial powers of Congress and the Executive to prescribe the categories of aliens who may enter and remain in this country and the conditions under which they may do so (see Pet. Br. 13–14, 42–48). In response to this contention, a suggestion was made at oral argument that if Congress had directly prohibited aliens from working for the federal government as a condition of entering or remaining in this country, it might be an "unconstitutional condition." The rationale of this Court's decisions concerning "unconstitutional conditions" does not, however, support such an argument.

The doctrine of unconstitutional conditions originally developed in a series of cases involving state laws that required out-of-state corporations, as a condition of entering the State and exercising the "privilege" of engaging in intrastate commerce, to waive or relinquish specific rights or privileges protected by the Constitution, or to consent to the State's exercise of jurisdiction beyond limits imposed by the Constitution. See, *e.g.*, *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583; *Terral* v. *Burke Construction Co.*, 257 U.S. 529, 532–533; *Western Union Tel. Co.* v. *Kansas*, 216 U.S. 1; cf. *Parden* v. *Terminal Ry.*, 377 U.S. 184, 193–194, n. 11; *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9–10, n. 10; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R.R.*, 282 U.S. 311, 328–331. See generally Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929); Oppenheim, *Unconstitutional Conditions and State Powers*, 26 Mich. L. Rev. 176 (1927).

Absent such interference with a specific constitutional right, which would override state law by virtue of the Supremacy Clause, the Court has assumed "that the State has the power and constitutional right arbitrarily to exclude the [foreign corporation] without other reason than that such is its will." *Fidelity & Deposit Co.* v. *Tafoya*, 270 U.S. 426, 434. The doctrine of unconstitutional conditions developed in the Commerce Clause cases thus imposes relatively limited restrictions "upon what still remains the practically arbitrary power of a State in dealing with the desire of

[1] While the Court was specifically concerned in *Salfi* with an act of Congress concerning eligibility for Social Security survivor's benefits, its analysis is no less applicable to federal regulations, as the Court's reliance upon *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, makes clear. See *Salfi*, *supra*, slip op. at 22–25. Moreover, the power of Congress and the Executive branch with respect to federal government employment is even greater than the power of Congress concerning social welfare legislation (see Pet. Br. 23–50).

unconstitutional conditions doctrine does not affect the regulation involved here.[4]

In any event, application of the doctrine of unconstitutional conditions to the federal government's powers over immigration would be inconsistent with the long line of this Court's decisions subjecting the exercise of that power to only the most limited judicial review (see Pet. Br. 48–50).

3. Finally, as indicated in the Appendix to this supplemental brief, during its present and preceding sessions Congress has continued to enact a variety of legislation distinguishing in diverse ways between citizens and aliens. This legislative adherence to citizenship and alienage as proper criteria for shaping national policies is entitled, we believe, to considerable respect.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

[4] The Court's reaffirmance of *United Public Workers* v. *Mitchell*, 330 U.S. 75, in *Letter Carriers* is significant in this regard, for the earlier decision had been characterized as being inconsistent with the unconstitutional conditions doctrine. See Van Alstyne, *supra*, 81 Harv. L. Rev. at 1447.

APPENDIX*

5 U.S.C. (Supp. IV) 552a(a)(2). Rights of individuals under Privacy Act of 1974 extend only to citizens and aliens lawfully admitted for permanent residence.

5 U.S.C. (Supp. IV) 8701(a)(B) and 8901(1)(ii). Federal employees who are not citizens or nationals of the United States are ineligible for federal life and health insurance programs if permanent duty station is outside the United States and the Panama Canal Zone.

7 U.S.C. (Supp. IV) 2044(b)(6) and 2045(f). Farm labor contractors may not employ aliens not lawfully admitted for permanent residence or authorized by Attorney General to accept employment.

10 U.S.C. (Supp. IV) 2004(b). Commissioned officers of the armed forces are eligible for detail as law students only if citizens.

16 U.S.C. (Supp. IV) 460*l*–6a(a)(4). Of citizens and domiciliaries of the United States are eligible for lifetime national parks and forest admission permits.

18 U.S.C. (Supp. IV) 613. Persons who are not citizens or lawfully admitted for permanent residence

*Like the Appendix to our main brief, this Appendix, covering the enactments of the 93d and 94th Congresses through April 1975, includes only permanent legislation embodied in the United States Code that unequivocally distinguishes between citizens of the United States and aliens. We have not included in either appendix appropriations acts or other legislation pertaining only to the District of Columbia or other areas subject to the jurisdiction of the United States, or statutes that appear to refer to "citizens" only in a non-technical sense or only in a "findings" section.

are prohibited from making political campaign contributions.

19 U.S.C. (Supp. IV) 1330(a). Members of International Trade Commission must be citizens.

22 U.S.C. (Supp. III) 2872(b)(2). Only citizens are eligible to be voting members of Board for International Broadcasting.

26 U.S.C.A. (Supp. 3) 6096(a). Non-resident aliens may not designate payment of portion of income tax liability to Presidential Election Campaign Fund.

26 U.S.C.A. (Supp. 3) 6428(h). Nonresident aliens are ineligible for automatic $100 tax credit.

29 U.S.C.A. 633a. Aliens employed outside the limits of the United States are excepted from prohitions against discrimination based on age in personnel actions taken by specified parts of federal and District of Columbia governments.

29 U.S.C.A. 1003(b)(4) and 1321(b)(7). Employee pension plans and other benefit plans maintained outside the United States primarily for the benefit of persons substantially all of whom are non-resident aliens are excepted from coverage of provisions protecting employee pension plans and other benefit plans.

33 U.S.C. (Supp. 1) 1502(5), (12) and 1503(g). Noncitizens are ineligible for licenses to own, construct and operate deepwater ports in waters beyond the territorial limits of the United States.

38 U.S.C. (Supp. III) 1002(4). Citizens who served in armed forces of allied government may be buried in national cemeteries.

42 U.S.C. (Supp. III) 4954(c). Volunteers in anti-poverty programs who are not citizens or nationals of the United States need not take oath specified by 22 U.S.C. 2504(j).

42 U.S.C.A. (Supp. 1) 5816(h). Energy Research and Development Administration is authorized to employ non-citizens in expert, scientific, technical, or professional capacities whenever the Administrator deems it in the public interest.

42 U.S.C.A. (Supp. 1) 5841(a). Members of Nuclear Regulatory Commission must be citizens.

42 U.S.C.A. (Supp. 1) 5906(b)(2)(A). Directors of boards of joint Federal-industry corporations formed to develop non-nuclear energy technology must be citizens.

45 U.S.C.A. (Supp. 1) 231(h)(6)(iii). Remuneration for services performed by nonresident aliens for periods while temporarily present in the United States pursuant to 8 U.S.C. 1101(a)(15) (F) or (J) are excluded from coverage of Railroad Retirement Act of 1974.

45 U.S.C.A. (Supp. 1) 231(d)(3). Services rendered when outside United States by persons not citizens or residents of United States for employer required by laws of place of services to employ citizens or residents thereof are excluded from coverage of Railroad Retirement Act of 1974.

47 U.S.C.A. (Supp. 1) 303(*l*)(3), 310(b), (c). Alien may operate amateur radio station only under specified circumstances.

47 U.S.C.A. (Pocket Part) 1301(22). Only citizens of the United States may be "intrastate air carriers" for purposes of the Federal Aviation Act.

50 U.S.C. App. (Supp. III) 2019(b). Only citizens of the United States or of the Trust Territory of the Pacific Islands are eligible to file Micronesian war claims.

U.S. GOVERNMENT PRINTING OFFICE: 1978